2011 WL 10934643 (C.D.Cal.) (Trial Motion, Memorandum and Affidavit)
United States District Court, C.D. California.
Southern Division

Maxine DERRY and Russell Hemen, individually and on behalf
of themselves and all others similarly situated, Plaintiffs,
v.
JACKSON NATIONAL LIFE INSURANCE COMPANY, a Michigan corporation, Defendant.

No. SACV11-00343 DOC (RNBx).
July 8, 2011.

Defendant Jackson National Life Insurance Company's Notice of Motion and Motion to Dismiss and Strike Portions of Plaintiffs' Amended Complaint; Memorandum of Points and Authorities in Support Thereof

Peter I. Ostroff (SBN 045718), postroff@sidley.com, Sean A. Commons (SBN 217603), scommons@sidley.com, Sidley Austin LLP, 555 West Fifth Street, Los Angeles, California 90013, Tel: (213) 896-6000, Fax: (213) 896-6600; Joel S. Feldman (admitted pro hac vice), jfeldman@sidley.com, Eric S. Mattson (admitted pro hac vice), emattson@sidley.com, Sidley Austin LLP, One South Dearborn Street, Chicago, Illinois 60603, Tel: (312) 853-7000, Fax: (312) 853-7036, Attorneys for defendant, Jackson National Life Insurance Company.

Date: August 8, 2011

Time: 8:30 a.m.

Location: Courtroom 9D

TO THE CLERK OF THE CENTRAL DISTRICT OF CALIFORNIA AND PLAINTIFFS' COUNSEL OF RECORD:

PLEASE TAKE NOTICE that defendant Jackson National Life Insurance Company moves to dismiss and strike claims and allegations in the Amended Complaint pursuant to Rules 12(b)(6) and 12(f) for failure to state a claim or cognizable basis for relief. The motion shall be heard by the Honorable David O. Carter in Courtroom 9D of the United States District Court, 411 West Fourth Street, Santa Ana, California 92701-4516 on Monday, August 8, 2011, at 8:30 a.m. This motion is made following the conference of counsel pursuant to Local Rule 7-3 on June 17, 2011. Declaration of Sean A. Commons ¶ 2.

This motion is based upon this notice of motion and motion, the attached memorandum of points and authorities, the Declaration of Sean A. Commons, any reply, and any other arguments that may be presented to the Court.

Dated: July 8, 2011

Respectfully submitted,

SIDLEY AUSTIN LLP

By: */s/ Joel S. Feldman*

Joel S. Feldman

Attorneys for defendant

Jackson National Life Insurance Company

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MEMORANDUM OF POINTS AND AUTHORITIES

Defendant Jackson National Life Insurance Company ("Jackson") respectfully submits this memorandum in support of its motion to dismiss and strike.

Introduction

This is plaintiffs' second attempt to sue Jackson over the sale of deferred annuities to senior citizens. The first attempt ended in failure: The district court (Wilken, J.) denied plaintiffs' request to join a then-pending lawsuit against Jackson, and subsequently entered summary judgment in favor of Jackson on all claims -- including the same California statutory claims raised here. *Kennedy v. Jackson National Life Ins. Co.*, No. 07-cv-00371-CW, Dkt. 125 (N.D. Cal. Oct. 14, 2009) (attached as Exhibit A to Commons Decl.) (denying plaintiffs' motion to join as putative class representatives); *id.*, 2010 U.S. Dist. LEXIS 111653 (N.D. Cal. Oct. 6, 2010) (attached as Exhibit B to Commons Decl.) (granting Jackson's motion for summary judgment). After several years of discovery, the court found the *Kennedy* plaintiff's theories to be factually unsubstantiated and legally untenable. *Id*. Plaintiffs' counsel -- who also represented the plaintiff in *Kennedy* -- are now trying their luck a second time with a new set of plaintiffs and claims.

The purpose of this motion is to pare this lawsuit back to the only legally cognizable issue that was not squarely addressed in *Kennedy* -- specifically, Jackson's alleged failure to comply with certain disclosure requirements in sections 10127.10 and 10127.13 of the California Insurance Code. While those issues figure prominently in the Amended Complaint (*see* ¶¶ 2, 6, 8, 31-52, 60, 73(a), & 77), plaintiffs have also included noise and smoke about such things as commissions that Jackson pays to agents who sell its annuities. These claims were rejected in *Kennedy* and should be rejected here. In addition, the Court should strike requests for relief that lack either a sound basis in California law or any grounding in factual allegations, such as claims based on "physical **abuse**."

As explained below, plaintiffs' "kitchen sink" approach to pleading their claims does nothing but clutter the case with irrelevancies. If this motion is granted, it will narrow the scope of discovery and speed the resolution of the only claims about which there is a bona fide dispute.

Background

Jackson is a leading provider of deferred annuities. As the court explained in *Kennedy*, "An annuity is a contract between an annuitant and an insurance company, under which the insurance company agrees to credit interest on a premium paid by the annuitant." 2010 U.S. Dist. LEXIS 111653, at *3. Jackson sells its annuities in California through independent agents, not through Jackson employees, and those independent agents are free to sell annuities issued by other companies. *Id*. at 3, 5.

Jackson pays the agents commissions. For example, the agent who sold plaintiff an annuity in *Kennedy* was paid a commission of 8 percent of the invested premium. *Id*. at *5.

Plaintiffs Maxine Derry and Russell Hemen purchased deferred annuities from Jackson in August 2005 and March 2006. Am. Compl. ¶¶ 50-52. The Amended Complaint does not allege that the agents who sold plaintiffs these annuities made any false or misleading statements. On the contrary, plaintiffs expressly disclaim reliance on any theory sounding in fraud. *Id*. ¶ 6. Rather, the Amended Complaint is based on alleged shortcomings in certain disclosures on the cover of the policies, which policyholders receive after they already have decided to purchase annuities. In particular, plaintiffs allege that the covers of Jackson's policies technically fail to comply with two statutes: Cal. Ins. Code §§ 10127.10 and 10127.13. *Id*. ¶¶ 2, 6, 8, 31-52, 60, 73(a), & 77.

Jackson disputes these allegations, including because its policies were approved by California regulators and disclose the very terms plaintiffs suggest were not disclosed. Jackson, however, is not seeking dismissal of the claim that it violated the UCL's "unlawful" prong based on these statutes in this motion. It is seeking the dismissal of all other claims, including plaintiffs' claim under the **Elder** **Abuse** and Dependent Adult Civil Protection Act ("**Elder** **Abuse** Act"), Cal. Welf. & Inst. Code. § 15600 *et seq*.

Legal Standard

A claim is subject to dismissal under Rule 12(b)(6) when the facts as alleged fail to state a plausible basis for relief. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009); *Sherman v. Hertz Equip. Rental Corp.*, No. SACV 10-1540 DOC (RNBx), 2011 WL 317985, at *1 (C.D. Cal. Jan. 28, 2011). Courts disregard conclusory statements or legal assertions. *Colony Cove Props., LLC v. City of Carson*, 640 F.3d 948, 955 (9th Cir. 2011); *Hanaway v. JPMorgan Chase Bank*, No. SACV 10-1809 DOC (PLAx), 2011 WL 672559, at *1 (C.D. Cal. Feb. 15, 2011).

Rule 12(f) entitles a party to move to strike immaterial or impertinent matter. An issue is immaterial if it "has no essential or important relationship to a claim for relief" and impertinent if it "does not pertain, and [is] not necessary, to the issues in question." *Harris v. Del Taco, Inc.*, No. SACV04-730, 2004 WL 3744291, at *2 (C.D. Cal. Sept. 13, 2004), citing *Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1527 (9th Cir. 1993), *rev'd on other grounds*, 510 U.S. 517 (1994). The purpose of a 12(f) motion is to "avoid the expenditure of time and money ... litigating spurious issues by dispensing with those issues prior to trial." *Fantasy*, 984 F.2d at 1527 (quotation marks and citations omitted).

Argument

I. The Court Should Strike Claims For Relief That Are Based On Inapplicable Laws.

The California Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200 *et seq.*, creates a private right of action for "three varieties of unfair competition: the unlawful, the unfair, and the fraudulent." *Webb v. Smart Document Solutions, LLC*, 499 F.3d 1078, 1082 (9th Cir. 2007). Plaintiffs' UCL claim is brought under the "unlawful" prong of the statute. *See, e.g.*, Am. Compl. ¶¶ 26-27, 49, 73. The Amended Complaint expressly disclaims "any claims that are based on or grounded in fraud" (*id*. ¶ 6), and plaintiffs never allege that Jackson's actions were "unfair."

To plead a viable "unlawful" claim, plaintiffs "may not simply set forth a catalogue of statutes that purportedly were violated." *Moroney v. Am. Int'l Group*, 415 F. Supp. 2d 1027, 1034 (N.D. Cal. 2006). Instead, they must "allege the factual basis for [their] claim[s] that each of such statutes was violated." *Id*.

A. As plaintiffs have acknowledged, the CLRA does not apply to annuities and thus cannot form the predicate for a violation of the UCL's "unlawful" prong.

Annuities are a form of life insurance. *Kennedy*, 2010 U.S. Dist. LEXIS 111653, at *22; Cal. Ins. Code § 101. But the Consumers Legal Remedy Act ("CLRA"), Civil Code § 1750 *et seq.*, does not apply to the sale of life insurance because life insurance is not a "good" or "service" within the meaning of the statute. *Fairbanks v. Superior Court*, 46 Cal. 4th 56, 61 (2009). Thus, "because the CLRA does not apply to sales of insurance, it likewise does not apply to the sale of annuities." *Estate of Migliaccio v. Midland Nat'l Life Ins. Co.*, 436 F. Supp. 2d 1095, 1109 (C.D. Cal. 2006); *accord Moroney*, 415 F. Supp. 2d at 1035-36.

Despite the foregoing, and despite the fact that Jackson's counsel explained the inapplicability of the CLRA during a meet-and-confer before plaintiffs amended their complaint, plaintiffs asserted in their Amended Complaint that Jackson committed "unlawful" acts under the UCL by "violating Cal. Civ. Code §§ 1750, *et seq.*" -- the CLRA. Am. Compl. ¶ 73(b). During the meet-and-confer process prior to the filing of this motion, plaintiffs' counsel acknowledged they "are not going to rely on" any theory that Jackson violated the CLRA. *See* E-mail from Howard Finkelstein to Jackson's counsel, June 24, 2011 (attached as Exhibit C to Commons Decl.). However, plaintiffs have not withdraw that claim from their Amended Complaint. Accordingly, the Court should strike paragraph 73(b) of the Amended Complaint.

B. Plaintiffs have no viable claim under Cal. Welf. & Inst. Code § 15657, which prohibits "physical abuse" and "neglect."

This is a case about the sale of annuities to senior citizens. Nevertheless, plaintiffs have asserted that Jackson violated Cal. Welf. & Inst. Code. § 15657, which forbids "physical **abuse**" and "neglect" of senior citizens. *See* Am. Compl. ¶ 73(c) & Prayer for Relief ¶ G. The law defines "physical **abuse**" to cover such things as assault and battery (Welf. & Inst. Code. § 15610.63), but nothing along those lines is alleged here. "Neglect" is defined to include things like failing to help a senior citizen with personal hygiene or to prevent dehydration (*see id*. § 15610.57); nothing along those lines is alleged here either. Those theories have no place in this lawsuit. They should be stricken.

C. Cal. Probate Code § 850 applies only to probate actions, and this is not a probate action.

In their prayer for relief (¶ I), plaintiffs purport to seek "transfer of the wrongfully obtained monies and/or property under Cal. Probate Code §§ 850 *et seq.*" Plaintiffs have no plausible right to relief under the Probate Code. The first sentence of the cited statute provides that "the following persons may file a petition requesting that the court make an order under this part," and then lists people who may seek relief and what sort of relief they may seek. *See* Cal. Prob. Code § 850. People in plaintiffs' position are not on the list. Moreover, the Probate Code states that it does not apply to issues which should be determined by a civil action. *Id*. § 856.5. This is a civil action; accordingly, the Probate Code does not apply. Plaintiffs' attempt to seek relief under it should be stricken.

D. Private parties cannot seek damages under § 17206.1.

Plaintiffs' prayer for relief (¶ H) also seeks "treble damages and penalties under Cal. Bus. & Prof. Code § 17206.1." This claim should be stricken because the cited statute has no potential application here. Section 17206.1 provides that civil penalties may be assessed in an action "as prescribed in Section 17206." Section 17206, in turn, permits civil actions to be brought by certain government attorneys -- not private plaintiffs. Cal. Bus. & Prof. Code § 17206; *see also Kasky v. Nike, Inc.*, 27 Cal. 4th 939, 950 (2002) (citations omitted) ("in a suit under the UCL, a public prosecutor may collect civil penalties, but a private plaintiff's remedies are generally limited to injunctive relief and restitution"). Because this suit is being brought by private plaintiffs -- not the Attorney General or other government authorities described in Section 17206 -- this portion of the prayer for relief should be stricken. *See id*.; *see also Brown v. Allstate Ins. Co.*, 17 F. Supp. 2d 1134, 1140 (S.D. Cal. 1998); *Bateman v. Por-Ta Target, Inc.*, No. C 01-5599, 2004 U.S. Dist. LEXIS 30640, at *16 (N.D. Cal. July 28, 2004).

E. Plaintiffs seek damages under Cal. Ins. Code § 789 without alleging any violation of the statute.

The next portion of plaintiffs' prayer for relief (¶ H) seeks penalties under Cal. Ins. Code § 789, and it too should be stricken. Under section 789, a court can assess penalties if a defendant has violated sections 785-789.10 of the Insurance Code. Cal. Ins. Code § 789(b). Although the Amended Complaint cites a host of statutory provisions, at no point does it allege that Jackson violated sections 785-789.10. Accordingly, plaintiffs' claim for relief under section 789 should be stricken.

F. Plaintiffs' request for treble damages should be stricken.

The final portion of the prayer for relief (¶ H) seeks treble damages and penalties "as to counts for which they are available under the applicable law in such amount as the Court deems just and proper." But the California Supreme Court has held that treble damages are not recoverable under the UCL. *Clark v. Superior Court*, 50 Cal. 4th 605, 614-15 (2010). The **Elder Abuse** Act likewise lacks a treble damages provision, and plaintiffs have cited no other basis for an award of treble damages. Accordingly, this portion of plaintiffs' prayer for relief should be stricken.

II. Plaintiffs' Aiding And Abetting Claim Should Be Dismissed For Failure To Allege Any Action By An Agent Which Jackson Aided And Abetted.

The Amended Complaint alleges that Jackson "aided and abetted its Agents in accomplishing the wrongful acts," but never identifies what wrongful act was committed by agents of Jackson. Am. Compl. ¶¶ 75, 84. A claim for aiding and abetting requires that the defendant know the other's conduct constitutes a violation and gives substantial assistance to the violation. *See Chetal v. Am. Home Mortgage*, No. C 09-02727 CRB, 2009 U.S. Dist. LEXIS 77806, at *12 (N.D. Cal. Aug. 24, 2009); *Fiol v. Doellstedt*, 50 Cal. App. 4th 1318, 1325 (1996) (explaining the standard for common law aiding and abetting in the context of a tort case). Because a claim for aiding and abetting requires proof of a violation by another person, and plaintiffs have failed to allege that any agent of Jackson violated the UCL or committed financial **abuse**, the allegations of aiding and abetting should be dismissed.

III. Plaintiffs' Claims Stemming From The Non-Disclosure Of Commissions Or The Imposition Of Surrender Charges Should Be Dismissed Or Stricken.

Plaintiffs do not explicitly plead the non-disclosure of commissions or the imposition of surrender charges as part of either count of their Amended Complaint. This is for good reason, as the court rejected this theory in *Kennedy*, 2010 U.S. Dist. LEXIS 111653, at *27-28. Yet throughout their Amended Complaint, plaintiffs complain about the fact that Jackson pays commissions to sales agents and imposes a surrender charge for early withdrawals. *E.g.*, Am. Compl. ¶¶ 19, 27-29, 50, 51. To the extent that plaintiffs are seeking to assert a cause of action based on these complaints, any such cause of action should be dismissed. To the extent plaintiffs do not seek to assert a cause of action based on these complaints, they should be stricken as immaterial. Fed. R. Civ. P. 12(f).

Any claim that the non-disclosure of commissions gives rise to a cause of action -- either as a violation of the UCL, as "financial **abuse**," or under some other theory -- should be dismissed. No law requires insurers to disclose expenses such as commissions. In fact, the law is exactly to the contrary. In *Kennedy*, the court explained that Jackson had no duty to tell annuity purchasers that it paid commissions to independent agents:

> In essence, Plaintiff's theory is that Defendant had a duty to disclose its commissions because, along with other acquisition expenses, they impacted how much Defendant could pay in interest. Although it is true that Defendant's expenses likely had some effect on the rate of interest it decided to pay, the minimum guaranteed interest rate, the rate at which interest would be paid each year and the withdrawal charges were disclosed to prospective purchasers, including Plaintiff.

2010 U.S. Dist. LEXIS 111653, at *28.

The *Kennedy* holding followed a long line of cases finding that, absent a conflicting statutory rule, there is no duty to disclose the payment of commissions. *See Peterson v. Cellco P'ship*, 164 Cal. App. 4th 1583, 1586-87, 1589-93 (2008) (failure to disclose commissions on cell phone insurance could not support UCL claim); *McCann v. Lucky Money, Inc.*, 129 Cal. App. 4th 1382, 1395, 1399 (2005) (rejecting UCL claim based on non-disclosure of "commissions," "fees," and "wholesale exchange rate" on foreign currency transactions); *Kunert v. Mission Fin. Servs. Corp.*, 110 Cal. App. 4th 242, 264-66 (2003) (dismissing UCL claim based on non-disclosure of commissions paid in connection with car loans); *Searle v. Wyndham Int'l, Inc.*, 102 Cal. App. 4th 1327, 1333-36 (2002) (rejecting UCL claim that hotel should have disclosed the "service charge" paid to employees). In short, the UCL does not require a business "to advise consumers about what it does with the revenue it receives from them." *Id*. at 1335.

This general rule is supported here by the fact that the California legislature has imposed multiple requirements about what insurers must tell annuity purchasers, but has enacted no requirement about the disclosure of commissions. *See, e.g.*, Cal. Ins. Code §§ 762, 787, 789.8, 789.10, 790, 1749.8, 10168.1, 10509.8. When the California legislature intends to require the disclosure of commissions, it does so explicitly. *E.g.*, Cal. Bus. & Prof. Code § 6175.3 (requiring lawyers who sell financial products to the **elderly** to disclose commissions), § 10147.5 (requiring disclosure about real estate brokers' commissions), and § 10241 (mandating disclosure of commissions by real estate brokers who negotiate loans on behalf of borrower); Cal. Fin. Code § 1843 (requiring disclosure of commissions in currency exchange transactions). "The fact that California's comprehensive regulation of Defendants' practices does not label the challenged practices unfair is a further defense to any such claim." *See McCann*, 129 Cal. App. 4th at 1395.

IV. Plaintiffs Fail To State A Claim For Elder Abuse.

The Court should dismiss plaintiffs' claim of "financial **abuse**" under the California **Elder Abuse** Act and strike any related prayer for relief. [1] Accepting the allegations in the Amended Complaint as true, plaintiffs have failed to state a viable claim for "financial **abuse**," and their claim under the Act is time-barred.

The definition of "financial **abuse**" in the **Elder Abuse** Act requires a showing that the defendant took property for a "wrongful use" or "with intent to defraud." Cal. Welf. & Inst. Code § 15610.30(a). Plaintiffs have disclaimed any theory grounded in fraud (Am. Compl. ¶ 6), so the question presented here is whether they have alleged facts making it plausible to think that Jackson took property for a "wrongful use." There are no such allegations. The **Elder Abuse** Act was intended to redress truly "gross mistreatment" of **elderly** persons "in the form of **abuse** and custodial neglect." *Delaney v. Baker*, 20 Cal. 4th 23, 33 (1999); *accord Lyddon v. Rocha-Albertsen*, No. 1:03-CV-05502, 2006 U.S. Dist. LEXIS 78957, at *99 (E.D. Cal. Oct. 30, 2006) (**elder abuse** requires "egregious conduct"). The Legislature sought to proceed "carefully and diligently in its effort to curb the worst practices against" **elders**. *Das*, 186 Cal. App. 4th at 735 (citation omitted). Here, once the rhetoric is stripped away, the only relevant factual allegations are that Jackson purportedly failed to comply with the post-sale disclosure requirements of sections 10127.10 and 10127.13 of the California Insurance Code. But the Legislature could not have intended to make **elder abuse** claims nothing more than UCL "unlawful" claims with different remedies. The Court should decline plaintiffs' invitation to radically expand the Act in this manner.

Plaintiffs also fail to allege any type of physical or mental harm necessary to pursue a claim under the **Elder Abuse** Act. Cal. Welf. & Inst. Code § 15610.07. As this Court recently ruled when granting a motion to dismiss, "financial **abuse**" does not cover every financial transaction involving persons over 65, only those where the alleged taking caused "physical harm or pain or mental suffering." *Siemonsma v. Mut. Diversified Employees Fed. Credit Union*, No. SACV 10-1093 DOC (MLGx), 2011 U.S. Dist. LEXIS 44032, at *14-15 (C.D. Cal. Apr. 19, 2011). The Court's holding is consistent with the Legislature's intent to limit **Elder Abuse** Act claims to truly egregious misconduct. *See* Cal. Welf. & Inst. Code § 15600 (describing the overall

purpose of **Elder** **Abuse** Act as to protect "the welfare of an **elder** or dependent adult [that] is endangered, and [to] ensure the individual's safety").

A California Appellate court has held to the contrary in a published decision, but the Court plainly erred. *Bonfigli v. Strachan*, 192 Cal. App. 4th 1302, 2011 WL 628632, at *9 (2011); *accord Bellue v. Young-Bellue*, No. E037245, 2006 Cal. App. Unpub. LEXIS 5216, at *7-8 (June 16, 2006) (UNPUBLISHED). The Court failed to recognize that Section 15610.07 does not merely define the types of conduct that constitute **elder** **abuse**, but also the types of harm that such conduct must cause to qualify as **elder** **abuse**. Section 15610.07 defines "**abuse** of an **elder**" to always require a physical or mental injury.
"**Abuse** of an **elder** or a dependent adult" means either of the following:

(a) Physical **abuse**, neglect, financial **abuse**, abandonment, isolation, abduction, or other treatment with resulting physical harm or pain or mental suffering.

(b) The deprivation by a care custodian of goods or services that are necessary to avoid physical harm or mental suffering.

The plain language reading of this section is that "financial **abuse**" is a type of "treatment" that causes "resulting physical harm or pain or mental suffering." This plain language reading is reinforced by the fact that every other type of "**abuse**" identified in Section 15610.07 as "**elder** **abuse**" -- physical **abuse**, neglect, abandonment, isolation, abduction, and deprivation -- is the type of conduct one reasonably would expect to cause physical or mental suffering. It thus is not surprising that California Appellate courts have assumed that a plaintiff must prove some type of physical harm or mental suffering to pursue a claim for financial **abuse**. *Sturgeon v. King*, 2006 Cal. App. Unpub. LEXIS 11127, at *9-10 (Dec. 11, 2006) (UNPUBLISHED) (reversing demurrer because plaintiff had alleged sufficient facts to infer "mental suffering" as a result of alleged "financial **abuse**"); *Raicevic v. Lopez*, No. D055002, 2010 Cal. App. Unpub. LEXIS 6575, at *15 (Aug. 18, 2010) (UNPUBLISHED) (describing **Elder** **Abuse** Act as creating civil liability for " 'financial **abuse**' of an **elder**, with resultant physical harm or pain or mental suffering"); *cf. Conservatorship of Gregory*, 80 Cal. App. 4th 514, 521 (2000) (holding Section 15610.07 applies to civil claims under the **Elder** **Abuse** Act).

Plaintiffs may argue that they are pursuing a claim under Section 15657.5, which refers to "financial **abuse**, as defined in Section 15610.30," and Section 15610.30 does not expressly require physical harm or suffering. This argument, however, ignores that Section 15610.30 is merely meant to describe the manner in which defendants must commit "financial **abuse**" to be held liable. Section 15610.30 does not purport to describe the harm that must occur to qualify as "**elder** **abuse**." Arguing that Section 15610.30 does not incorporate Section 15610.07 would essentially read the definition of "**abuse**" out of the **Elder** **Abuse** Act, violating the basic canon of statutory construction that "[t]he definition of a term in the definitional section of a statute controls the construction of that term wherever it appears throughout the statute." *See Conservatorship of Gregory*, 80 Cal. App. 4th at 521 (applying Section 15610.07 to civil claims under the **Elder** **Abuse** Act); *see also* Cal. Welf. & Inst. Code § 15600 ("[t]he definitions ... shall govern the construction of this chapter, unless the context requires otherwise").

Plaintiff undoubtedly will argue that other courts have allowed **Elder** **Abuse** claims to proceed without requiring physical harm or suffering. *See, e.g., Negrete v. Fid. & Guar. Life Ins. Co.*, 444 F. Supp. 2d 998, 1001-1003 (C.D. Cal. 2006). But those cases did not consider the question, which apparently was never presented to them. A decision is not support for a proposition it never considered.

Regardless, plaintiffs' **elder** **abuse** claims are time-barred. Plaintiffs were allegedly harmed when they bought annuities from Jackson in August 2005 and March 2006. Am. Compl. ¶¶ 50-51. They then waited more than five years to file this action. As a result, their claims are time-barred whether this Court applies the three-year limitations period which governs **Elder** **Abuse** claims that accrued prior to January 1, 2009, or the four-year limitations period that governs claims that accrued after January 1, 2009.

Plaintiffs allege that their claims are not time-barred because of the "discovery rule" and class action tolling. Am. Compl. ¶¶ 69-71. For the reasons discussed below, the statute of limitations was not tolled via the discovery rule, and class action tolling does not apply to plaintiffs' **elder** **abuse** claim.

A. The allegations of the Amended Complaint render the discovery rule inapplicable.

Plaintiffs cannot use the discovery rule to toll the statute of limitations because any violation would be known to policyholders when they received their policies. The statute of limitations begins to accrue when "the plaintiff has actual or constructive knowledge of facts giving rise to the claim." *See Snapp & Assocs. Ins. Servs., Inc. v. Robertson*, 96 Cal. App. 4th 884, 891 (2002). Because the language of the annuity disclosure is the only "fact" which gives rise to the claims in this case, the statute of limitations began to accrue as soon as plaintiffs had actual or constructive knowledge of the policy language. "California cases recognize that an insured is under a duty to read his insurance policy, and the insured will be charged with the constructive knowledge of policy provisions which are plain, clear, and conspicuous." *Dias v. Nationwide Life Ins. Co.*, 700 F. Supp. 2d 1204, 1216 (E.D. Cal. 2010); *see also Hadland v. NN Investors Life Ins. Co.*, 24 Cal. App. 4th 1578, 1586 (1994) ("[i]t is a duty of the insured to read his policy"); *C & H Foods Co. v. Hartford Ins. Co.*, 163 Cal. App. 3d 1055, 1064 (1984) (rejecting claim that plaintiffs were unaware of policy provision where plaintiffs did not deny receiving the policy).

The Amended Complaint describes the purported violations of §§ 10127.10 and 10127.13 as "clear and undeniable." Am. Compl. ¶ 37. It is difficult to imagine a more conspicuous location for these disclosures than the front of the policy. The moment plaintiffs received their annuity policies, they knew of the only fact -- the allegedly inadequate disclosures -- that forms the basis of their claims. Because plaintiffs knew all of the facts relevant to their claims from the moment they received their policies, the discovery rule does not apply. *See Braxton-Secret v. A.H. Robins Co.*, 769 F.2d 528, 530 (9th Cir. 1985); *Leong v. Square Enix of Am. Holdings, Inc.*, No. CV 09-4484, 2010 U.S. Dist. LEXIS 47296, at *28 (C.D. Cal. Apr. 20, 2010).

Dean v. United of Omaha Life Ins. Co., No. CV 05-6067, 2007 U.S. Dist. LEXIS 99294, at *45-46 (C.D. Cal. Aug. 27, 2007), is instructive. The court was faced with the same question of when a plaintiff discovered that a policy disclosure did not comply with Cal. Ins. Code §10127.13. The court held that plaintiff had notice when he received the policy, explaining that "[i]t is irrelevant that the plaintiff is ignorant of... the legal theories underlying his cause of action." *Id*. at *46-47 (*citing Gutierrez v. Mofid*, 39 Cal. 3d 892, 897-98 (1985)).

B. The Elder Abuse Act claim was not tolled by *Kennedy*.

Plaintiffs assert that the statute of limitations was tolled as a result of *Kennedy*. Am. Compl. ¶ 71. But *Kennedy* did not toll the statute of limitations with regard to plaintiffs' **elder** **abuse** claim because that claim was not asserted in its present form in *Kennedy*. In *Kennedy*, the **Elder** **Abuse** Act claim was not based on alleged violations of sections 10127.10 and 10127.13; only the UCL claim was. *See* Exhibit D (*Kennedy* complaint) ¶ 145.

Plaintiffs now assert that Jackson committed **elder** **abuse** by "selling deferred annuities to seniors in violation of California laws." Am. Compl. ¶ 83. This is a new theory. Whereas the **elder** **abuse** allegations in *Kennedy* dealt exclusively with the methods used to convince class members to *purchase* policies, the **elder** **abuse** claims in this suit concern the disclosures on the cover page of the policies which plaintiffs *had already purchased*. Under these circumstances, class action tolling does not apply. *See Jolly v. Eli Lilly & Co.*, 44 Cal. 3d 1103, 1122-23 (1988).

In short, the plaintiff in *Kennedy* never pursued a theory that post-purchase technical statutory violations alone could constitute **elder** **abuse**, including at class certification or in opposition to summary judgment. *See* Exhibit D. Plaintiffs therefore cannot rely on *Kennedy* to toll their new theory under the **Elder** **Abuse** Act. *See Madani v. Shell Oil Co.*, No. CV 08-1283-GHK (JWJx), 2008 U.S. Dist. LEXIS 114535 (C.D. Cal. July 11, 2008) (rejecting class action tolling where plaintiffs in second action asserted the same cause of action, but relied on different legal theory); *see also Johnson v. Ry. Express Agency, Inc.*, 421

U.S. 454, 467 (1975) (explaining that class action tolling depends "heavily on the fact that [previous] filings [involve] exactly the same cause of action subsequently asserted"); *Loehr v. Ventura County Cmty. College Dist.*, 147 Cal. App. 3d 1071, 1085 (1983) (rejecting equitable tolling because plaintiffs in second action relied on new facts to prove a different wrong).

Conclusion

For the foregoing reasons, the Court should grant Jackson's motion to dismiss and strike.

Dated: July 8, 2011

Respectfully submitted,

SIDLEY AUSTIN LLP

By: */s/ Joel S. Feldman*

Joel S. Feldman

Attorneys for Defendant

Jackson National Life Insurance Company

Footnotes

1 Certain provisions of the **Elder** **Abuse** Act governing "financial **abuse**" claims were amended effective January 1, 2009. Jackson cites the earlier version of the Act because the amendments "were substantive, rather than procedural, and the Legislature did not state that the amendments were retroactive in effect." *Das v. Bank of Am.*, 186 Cal. App. 4th 727, 736-37 (2010); *see also, e.g., Lotenero v. Everett Fin. Inc.*, No. 1:11-CV-200 AWI SMS, 2011 U.S. Dist. LEXIS 64619, at *12 (E.D. Cal. June 17, 2011).

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